

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

JANE DOE, ET AL,)
)
Plaintiffs,)
)
vs.) Civil Case No. 09-23
)
BENIGNO R. FITIAL, ET AL,)
) Garapan, Saipan
Defendants.)

MOTION TO DISMISS

BEFORE THE HONORABLE ALEX R. MUNSON, Chief Judge,
on January 14, 2010

FOR THE PLAINTIFFS:

Bruce Jorgensen, Esq.
(Via telephone)

FOR DEFENDANT CNMI:

Elchinon Golob, Esq.

FOR DEFENDANT NMI RETIREMENT FUND:

James E. Holloman, Esq.

FOR DEFENDANT BOARD OF TRUSTEES:

OR DEFENDANT BOARD OF
Viola Alepuyo, Esq.
Deborah Fisher, Esq.

Transcribed by:

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Patricia A. Garshak
Official Court Reporter

(The following was transcribed from an audio tape recording by Patricia A. Garshak, Official Court Reporter:)

Thursday, January 14, 2010

THE CLERK: If Your Honor please, this is Civil Case 09-0023, Jane Doe, et al, versus Benigno R. Fitial, et al, coming up for a hearing on a Motion to Dismiss.

Will counsel please state your appearance.

MR. JORGENSEN: Good morning, Your Honor. This is Bruce Jorgensen, representing plaintiffs.

THE COURT: Good morning.

MR. GOLOB: Elchinon Golob, representing the Commonwealth.

MR. HOLLMAN: James E. Hollman, representing Northern Marianas Island Retirement Fund.

MS. ALEPUYO: Viola Alepuyo and Deborah Fisher,
representing the Board of Trustees.

THE COURT: Thank you.

The Clerk advises me that Mr. Lord could not be reached. The number that he gave us is only a recording, so we'll proceed without him.

1 MR. GOLOB: Very well, Your Honor.

2 THE COURT: I read all of the briefs and
3 everything that has been filed. I have a bunch of
4 questions for all parties.

5 First of all, for the Northern Marianas Islands
6 Retirement Fund Executive Director or the CNMI --
7 that's you, Mr. Golob; right?

8 MR. GOLOB: Well, I'm the CNMI. I'm not the
9 Retirement Fund or the Director.

10 MR. HOLLMAN: Your Honor, I'm the Retirement Fund
11 and the administrator.

12 THE COURT: All right. First of all, how much
13 money is owed to the fund today, approximately?

14 MR. HOLLMAN: I think it's approximately
15 \$281 million, Your Honor.

16 THE COURT: What was the judgment, 230?

17 MS. FISHER: Your Honor, if I may, originally, it
18 was 230, and then there was a subsequent hearing, at
19 which Miss Alepuyo presented testimony, and the Judge
20 actually modified the judgment. I believe we attached
21 a copy of that to one of our documents that we
22 submitted.

23 THE COURT: Do you agree it's around 281?

24 MS. FISHER: Yes, Your Honor.

25 THE COURT: Are there ongoing negotiations?

1 MS. FISHER: Your Honor, if I could have
2 Miss Viola Alepuyo address that, she's been
3 participating.

4 THE COURT: Thank you.

5 MS. ALEPUYO: It's called a negotiation, because
6 that's what the original judgment had said from the
7 Court. The Court had encouraged the parties to get
8 together to figure out a way in which to make payments.

9 Since then, yes, the talks have been occurring.
10 There has been a plan that has been presented from the
11 Central Government in which to figure out a way to pay
12 the judgment and ensure the financial viability of the
13 fund all the way up until the last member has been
14 paid.

15 There's currently a counteroffer -- not a
16 counteroffer, but an alternate plan that the Retirement
17 Fund is working on in order to present to the Central
18 Government. We are not quite in the phase yet to
19 present it to them, because we need to go through the
20 Board, as well as the members, before we can bring it
21 over to the Central Government.

22 THE COURT: How many sessions of negotiations have
23 there been?

24 MS. ALEPUYO: One -- two formal ones, Your Honor,
25 between the two parties. There have been talks, like,

1 prior to hearings.

2 THE COURT: When you say the two parties, are you
3 talking about the plaintiffs in this case?

4 MS. ALEPUYO: Not the plaintiffs in this case,
5 Your Honor, but the plaintiffs in the local action
6 court, yes.

7 THE COURT: Tell me again, how close are the
8 parties to agreeing on a viable plan to pay off the
9 judgment?

10 MS. ALEPUYO: I would say, Your Honor, that we're
11 more than halfway. With regards to payment of the
12 plan, that's one of the -- or payment on the judgment,
13 that's one of the issues that's being addressed.

14 However, the bigger issue is to ensure that the
15 Retirement Fund is financially sound, so that the last
16 member can be paid.

17 The judgment itself is being paid pursuant --
18 in addition, on November 2, those payments were
19 increased as an offer from the Central Government,
20 and they have been paid to date. The payments are
21 current.

22 THE COURT: They are current in the full amount?

23 MS. ALEPUYO: Yes, Your Honor.

24 THE COURT: And there's been an offer in these
25 negotiations of \$150 million or \$140 million?

1 MS. ALEPUYO: Actually, what the --

2 THE COURT: You know what? We don't have a court
3 reporter here. Maybe you better come up to the lectern
4 so that we get a good record.

5 (Pause in the proceedings.)

6 MR. HOLLMAN: Your Honor, I have some information
7 that might be useful --

8 THE COURT: Hang on. You're going to get your
9 chance at the questions.

10 MR. HOLLMAN: Thank you, Your Honor.

11 MS. ALEPUYO: With regards to the large amount
12 that's being contemplated to be paid over to the
13 Retirement Fund from the Central Government, there has
14 been steps taken to have a pension obligation bond
15 issued.

16 Now, it doesn't go forward in the 16th
17 Legislature, because there was, like, four different
18 versions. However, there is a draft currently that
19 the administration is going to sponsor to the
20 Legislature, and we're trying to figure out if we can
21 get that on the ballot this year, because we are going
22 to have an election. But we don't know if it's a
23 special election or a general election and whether
24 we're allowed to have an initiative, because you can't
25 have initiatives on a special election, Your Honor.

1 You can only have initiatives on a ballot through a
2 general election.

3 THE COURT: Doesn't the Legislature have the
4 authority to approve issuance of bonds?

5 MS. ALEPUYO: Yes, Your Honor, but before the
6 Legislature can approve the issuance of that bond, the
7 CNMI Constitution must be amended in order to allow for
8 that, because it is a public debt.

9 THE COURT: And so -- well, as a side issue, what
10 is the CNMI's bond rating, Triple A, Double A, A, B?

11 MS. ALEPUYO: Your Honor, if I could respectfully
12 defer to Mr. Aguon on that, he's the expert on that
13 with regards to the Retirement Fund.

14 THE COURT: Thank you.

15 (Pause in the proceedings.)

16 MS. ALEPUYO: According to Mr. Aguon, Your Honor,
17 a B or B-A -- is that correct? The best he can
18 remember.

19 THE COURT: B?

20 MS. ALEPUYO: B.

21 THE COURT: Well, even if that was successful and
22 there were \$140 million approved, what about the other
23 \$140 million?

24 MS. ALEPUYO: The bond that is actually being
25 contemplated, Your Honor, does not have a monetary

1 figure on it. The reason why is because we wanted
2 to be sure that we're allowed to get a pension
3 obligation bond by amending the Constitution and
4 then making a determination how much exactly it is
5 that's needed.

6 The one initiative that was before the 16th
7 Legislature that had a monetary figure was actually
8 \$200 million, and then there was three other
9 initiatives without a dollar figure, Your Honor.

10 THE COURT: And you say that that will take a
11 year?

12 MS. ALEPUYO: We're hoping -- the election is in
13 November, so yes, Your Honor.

14 THE COURT: So by that time, what's it anticipated
15 the debt is going to be? Over 300 million?

16 MS. ALEPUYO: More than likely, Your Honor, yes.
17 Yes, Your Honor.

18 THE COURT: Has the fund made public to its
19 beneficiaries a full accounting of the present status
20 of the bond?

21 MS. ALEPUYO: Yes, Your Honor. There is -- at the
22 end of every fiscal year, there is an external audit
23 that is conducted at the Retirement Fund. That is made
24 public. That is presented during a Board meeting,
25 where the meeting is announced to the public, and there

1 are actually members who attend.

2 In addition, every year, there's what's called a
3 Money Manager's meeting here at the Retirement Fund,
4 where all the money managers, including the investment
5 consultant, flies to Saipan, and they apprise the Board
6 of the fund's investment condition.

7 After the Money Manager's meeting with the Board,
8 Your Honor, there is also a presentation at the
9 Legislature. So the legislative body, as well as the
10 executive, they're invited so the report can be
11 presented to them.

12 In addition, there is always scheduled a meeting
13 at the Multipurpose Center, where it's announced to the
14 public, and members of the Retirement Fund, both
15 retirees and current Government employees, can come and
16 hear that report.

17 So yes, the answer to that question, Your Honor,
18 is yes.

19 THE COURT: Just so I'm perfectly clear, it's your
20 best estimate that the fund can fully be paid off
21 within a year?

22 MS. ALEPUYO: No, no, Your Honor.

23 THE COURT: What is that time line?

24 MS. ALEPUYO: With regards to the complete payment
25 of the judgment, Your Honor --

1 If I may have a moment, please.

2 (Pause in the proceedings.)

3 MS. ALEPUYO: Your Honor, I've been advised that
4 that process with regards to the pension obligation
5 bond is about 18 months to two years, as opposed to one
6 year.

7 THE COURT: So it's going to be 350 million by
8 then?

9 MS. ALEPUYO: Potentially, yes, Your Honor.

10 THE COURT: How long is it anticipated that the
11 present corpus can be viable to pay off all the
12 retirees?

13 MS. ALEPUYO: If I may have a moment, Your Honor.

14 (Pause in the proceedings.)

15 MR. HOLLMAN: Your Honor, if I may, we're doing
16 our best to answer that question. Mr. Aguon --

17 THE COURT: Announce your appearance, because on
18 the tape-recording, it's not going to show.

19 MR. HOLLMAN: James Hollman on behalf of the fund.

20 If I may, it's not that easy, but Mr. Aguon is
21 giving our best estimate, because we do have a
22 five-point plan we're trying to go forward with the
23 Legislature, and it entails a certain -- sum certain be
24 given every year which, in turn, would alter the figure
25 and the estimated --

1 THE COURT: I understand. Are you talking about
2 three years, five years?

3 MS. ALEPUYO: No, Your Honor. The Administrator
4 advises it's more like eight to nine years presently
5 with what we have in investments in the stock market,
6 as well as local investments.

7 THE COURT: And if nothing is done in nine years,
8 the fund would be completely broke?

9 MS. ALEPUYO: More or less, Your Honor, yes.

10 And Your Honor, I would just like to say that
11 during the hearings, we actually had the Retirement
12 Fund actuary testify in this very court through video
13 teleconference, and his expert -- in his expert
14 opinion, he could not come out and say whether the fund
15 was -- at what point could the fund be fully funded, at
16 what point could the -- how many years it would take
17 for the fund to actually be, for lack of a better word,
18 "broke", Your Honor.

19 He said that there was a multitude of different
20 factors, but that one of the things that he has advised
21 is that there needs to be an amendment to the laws in
22 order -- because Public Law 6-17 that sets up the
23 Retirement Fund, the way in which employer
24 contributions and employee contributions is supposed to
25 be coming in is different now that the fund is a closed

1 plan, as opposed to when all the members -- all the new
2 Government employees that were coming in were D-B
3 members, as opposed to the D-C plan or D-C members.
4 Because of the inception of the D-C plan, it's now a
5 different -- the situation is different.

6 THE COURT: Did the judgment in the Superior Court
7 include investment growth?

8 MS. ALEPUYO: No, Your Honor, it did not. It was
9 a draft -- there was an investment aspect of the
10 judgment that was addressed by the Judge. However, the
11 judgment itself contemplated payment -- I apologize.
12 Did you mean that did it include the lost opportunity
13 that was lost because --

14 THE COURT: Yes. I mean --

15 MS. ALEPUYO: Yes. That was phase two of the
16 trial, Your Honor.

17 THE COURT: What was the percentage that was
18 assigned to the judgment for growth?

19 MS. ALEPUYO: It varied on the different years
20 since the Retirement Fund had started investing, so it
21 depended on how much either the Retirement Fund earned
22 or lost in the stock market, and --

23 THE COURT: So what did that come out to be,
24 5 percent, 6 percent?

25 MS. ALEPUYO: On an average, you mean, Your Honor?

1 THE COURT: Yes.

2 MS. ALEPUYO: The market was, like, fluctuating
3 in, like, 2001, 2002; that was really bad years. The
4 rollercoaster ride was on a downturn, the Dot Com
5 crash, Your Honor. That was in the negatives.

6 There was some years we were up 5 percent, we were
7 up 9 percent.

8 THE COURT: Did the Court assign any percentage
9 for loss of growth on the money that is owed to the
10 fund?

11 MS. ALEPUYO: Not as a whole, but on a
12 year-by-year basis --

13 THE COURT: I understand.

14 MS. ALEPUYO: Yes, it did.

15 THE COURT: What was the range of the percentage
16 that the Court assigned to go from zero -- did it go
17 from zero to ten, or something else?

18 MS. ALEPUYO: We actually presented a graph, a
19 spread sheet, Your Honor, of all the different years,
20 how much money was remitted, how much money was not
21 remitted, and then how we did with the money that was
22 remitted.

23 I don't have that graph with me, Your Honor, but
24 we could submit it to the Court.

25 THE COURT: What's your best estimate?

1 MS. ALEPUYO: If I could have a moment, please.

2 (Pause in the proceedings.)

3 MS. ALEPUYO: For a three-and-a-half year, Your
4 Honor --

5 It was five years -- I'm sorry. At five years, it
6 was three-and-a-half percent, and at ten years, it was
7 four-and-a-half percent.

8 THE COURT: All right. Thank you.

9 Mr. Jorgensen, you wanted to be heard on one
10 issue?

11 MR. JORGENSEN: Your Honor, you mentioned the
12 timetable -- again, it's Bruce Jorgensen speaking. You
13 mentioned the timetable as to the ongoing negotiations,
14 and I attached as an Exhibit P-22 to a reply that was
15 supposed to have been electronically filed -- I'm not
16 sure whether that succeeded or not.

17 But in that news article, which was dated
18 January 6, the Chairman of the fund is quoted as
19 indicating that the Board plans to start negotiations
20 by the end of the month, meaning by the end of January.
21 So that would give you, I think, the time frame we're
22 looking for in that regard.

23 I have other comments as to some of these other
24 matters that were raised. I don't know if you'd like
25 to hear those now, or if you would like me to wait.

1 THE COURT: Let me ask you, why haven't you sought
2 to intervene in the Superior Court as an interested
3 party to urge the fund to begin collection proceedings
4 on its judgment?

5 MR. JORGENSEN: Your Honor, the primary reason is
6 that my clients and myself feel more comfortable in the
7 Federal forum, because we feel that there's both an
8 institutional conflict and a bevy of personal conflicts
9 related to the CNMI judiciary, which is unfortunate,
10 but I think that's what the circumstance is.

11 We also feel that the Federal Court has broader
12 latitude regarding prospective remedies.

13 THE COURT: Well, but you already have a judgment
14 in the Superior Court. The Superior Court is certainly
15 capable of enforcing its Orders.

16 MR. JORGENSEN: We feel that the Federal Court has
17 much broader capabilities in that regard, Your Honor.
18 The CNMI judiciary, while on paper it certainly has the
19 ability, I think the CNMI's fiscal condition concerns
20 the CNMI judiciary, as much as it does other CNMI
21 institutions.

22 THE COURT: Well, I mean, you can't go to one
23 court and win, and then if you're not satisfied, go to
24 another court on a matter that's been fully
25 adjudicated, can you?

1 MR. JORGENSEN: We feel that the Federal Court has
2 full jurisdictional capabilities to enforce the
3 judgment of the Superior Court, Your Honor.

4 THE COURT: What about abstention? Should this
5 Court abstain? There's a concept of comity.

6 MR. JORGENSEN: Yes, I understand the concept,
7 Your Honor. We don't feel it would be appropriate in
8 this case because of the inherent conflicts facing the
9 CNMI judiciary.

10 THE COURT: Well, the CNMI judiciary is the one
11 that issued the judgment in the amount of 230 million
12 bucks.

13 MR. JORGENSEN: Yes, Your Honor. That was a
14 default judgment. From my standpoint, it involved two
15 entities of the CNMI that we feel might not be dealing
16 at arm's length because of the political nature of --

17 THE COURT: Well, what do you got to lose by
18 petitioning the Court to intervene to have them enforce
19 that judgment?

20 MR. JORGENSEN: Well, the plaintiffs might be
21 willing to do that on their own, Your Honor. I'm not
22 admitted in the CNMI Superior Court.

23 THE COURT: Well, you could be admitted pro hac
24 vice.

25 MR. JORGENSEN: Your Honor, they require a

1 5,000-dollar application fee for pro hac vice, and my
2 clients are in no position to reimburse that kind of
3 funding.

4 THE COURT: Well, that can be waived, and you can
5 either -- and even defer payment until after the
6 judgment is satisfied. I understand what you're
7 saying, that you think all of these deficiencies, but
8 you haven't exhausted them yet, have you?

9 MR. JORGENSEN: No, Your Honor, I've not proceeded
10 in the CNMI Superior Court. If the matter goes to the
11 Superior Court, I will not be involved in it at that
12 level.

13 THE COURT: Say that again. What?

14 MR. JORGENSEN: If your Court should abstain or
15 invoke the doctrine of comity, I would not be able to
16 represent my clients. I would not feel comfortable
17 appearing before the CNMI judiciary for a variety of
18 reasons.

19 THE COURT: Let me ask you, why should the
20 plaintiffs be allowed to proceed as "Doe" plaintiffs?

21 MR. JORGENSEN: Because unlike some litigants who
22 have been before your Court previously, Your Honor, who
23 are young nonresident workers or middle-aged people, my
24 clients are very elderly, so they're very, very
25 susceptible to any interference with --

1 THE COURT: Aren't they in the States?

2 MR. JORGENSEN: Yes, they are. However, they do
3 maintain strong contacts with the CNMI, and of course,
4 it is the CNMI itself which is supposed to be providing
5 their benefits, and indeed, they have significant
6 difficulties communicating.

7 You mentioned earlier whether things have been
8 publicly communicated, and from the CNMI standpoint,
9 perhaps they have public meetings and that kind of
10 thing, but the fund has had no operable Internet
11 website for the mainland situated people, so they have
12 to rely on friends in the CNMI, as well.

13 THE COURT: Well, the affidavits that were in
14 support of their proceeding as "Doe's" were pretty
15 conclusionary. It would seem that you should review
16 those affidavits and explicitly state why, other than
17 in conclusionary fashion, that they should be allowed
18 to proceed.

19 I know in the garment factory, plaintiffs were
20 "Doe" plaintiffs, and the Ninth Circuit said they were
21 allowed to because of the declarations that they filed
22 that were very specific of why they had a fear of
23 retaliation. But just to say they're fearful of
24 retaliation, without some justification, I think is a
25 little thin.

1 MR. JORGENSEN: Very well, Your Honor. I will
2 communicate with them and, based on those
3 communications, prepare some supplemental submissions
4 for your review.

5 THE COURT: Questions for the Board: Does the
6 Board have a fiduciary duty to these people?

7 MS. FISHER: Your Honor, if I may; Deborah Fisher.

8 THE COURT: Could you come up to the lectern.

9 MS. FISHER: Your Honor, absolutely, we have a
10 fiduciary to our members, our beneficiaries.

11 What we're arguing, really, is that any kind of a
12 claim that someone would want to bring of that nature
13 is really of a trustee relationship, which is a State
14 Court claim.

15 So we actually had the beneficiaries intervene in
16 our State Court claim. Mr. Edward Arriola did make a
17 motion to intervene, and so there's been a recognition
18 in State Court that the beneficiaries have an interest
19 of some kind, and we would argue that we are
20 prosecuting this in the way that we need to.

21 We are upholding our fiduciary duties, and I don't
22 know if Your Honor wants me to go into it at this
23 point, but the distinction we're making here is just
24 that there's no Federal question jurisdiction. There's
25 nothing of a Constitutional nature.

1 THE COURT: You don't need to go into that right
2 now. Let me ask these questions.

3 You have a judgment. Why are you negotiating at
4 all?

5 MS. FISHER: This is something put forward,
6 actually, by the State Court judge that's in the
7 judgment. He, in some ways, even though this is a
8 huge, huge judgment, the Court -- it's almost as if
9 we're having Order in Aid of Judgment proceedings. As
10 Your Honor knows, we actually have another status
11 hearing January 25th, during which we're going to
12 report to the Court.

13 The Court made it clear that the Court wanted us
14 to enter into some kind of a discussion and negotiation
15 for how to pay this, because -- I think Your Honor has
16 recognized, this is a big undertaking and needs to be
17 thought about. There's a lot of angles on it in terms
18 of law making, as well as coming up with creative ways
19 to pay. And Your Honor, as Miss Alepuyo has stated,
20 the Government has already started to pay us more. We
21 have been getting certain tax revenues as we have --

22 THE COURT: Did it start paying down --

23 MS. FISHER: The employee contribution amount,
24 which we are owed. The amount that's coming in now is
25 higher than it was. We have actually --

1 THE COURT: That was my question. Is it
2 100 percent? Is the Government paying 100 percent what
3 they're supposed to do, and in addition, working down
4 the arrearage?

5 MS. FISHER: I understand, Your Honor. We're not
6 quite up to that amount, and for more specific numbers,
7 again, Miss Alepuyo spent 11 days -- I know this was a
8 default judgment, but we actually were on trial for --
9 I believe it was 11 days, with expert testimony from
10 our actuary, with testimony from money managers, going
11 through all of the laws that led us to what
12 contributions had to be paid.

13 This was not given to us. This was something that
14 we went through a lot of hours and hours and hours of
15 testimony on and had to prove.

16 THE COURT: Okay. I'm still not clear. Is the
17 Government now making 100 percent of the contributions
18 that they are required to make?

19 MS. FISHER: They are not, and I'd like, if I
20 could, to get a more exact number, just so you have an
21 idea.

22 THE COURT: So then this keeps growing and
23 growing; correct?

24 MS. FISHER: Well, you know, after going through
25 the actuary's testimony, I'm really reluctant to say

1 anything like that, because --

2 THE COURT: You don't need to be an accountant.

3 If you're not paying 100 percent of what you're
4 supposed to, then the debt's growing.

5 MS. FISHER: That's true, and that sounds right,
6 but when the actuary testified, he talked about the
7 solvency of the fund, and he was actually unwilling to
8 say, oh, the fund's not solvent, because he had so many
9 factors of how money's coming in and how these
10 investments make money or lose money. We got mortality
11 tables.

12 It's incredibly complicated, and so we sort of
13 thought, well, this is going to be really easy to
14 prove. We'll just put the actuary up, and he'll say
15 this one's not solvent. They're not paying. And
16 that's not what happened. It wasn't that
17 straightforward. He didn't go that far as to say this
18 is not solvent now, and --

19 THE COURT: I'm not talking about solvency. I'm
20 talking about increasing the debt. I mean, if they're
21 not paying 100 percent of what they're supposed to be
22 paying, then they're accruing more debt, are they not?
23 I mean --

24 MS. FISHER: We also have a situation now with a
25 closed plan where we have a set number of people, we

1 have certain people who are either leaving or who are
2 dying. We have certain money coming in. I think the
3 numbers change and shift, and I'd like to get -- you
4 know, if I could, Your Honor, I'm sorry --

5 THE COURT: Maybe I'm not making myself clear.
6 But if you have a credit card and you have a
7 hundred-dollar debt on it, and you only pay ten of a
8 hundred dollars, you owe the 90 percent and interest on
9 that.

10 By the same token, if the Government's not paying
11 100 percent of what they're supposed to be paying in,
12 aren't they increasing the amount of their debt?

13 MS. FISHER: If you don't mind, Your Honor, I
14 would really prefer if Miss Alepuyo could address it,
15 because I don't feel comfortable -- I'm not smart
16 enough with the financials. She did all of the
17 financial testimony.

18 THE COURT: All right.

19 MS. ALEPUYO: Thank you, Your Honor. I apologize.
20 With regard to -- when the Retirement Fund was first
21 set up, it was enacted by Public Law 6-17. Six-17 had
22 a methodology whereby the actuary was supposed to look
23 at various factors and then make a recommendation to
24 the Board of Trustees, who is then supposed to adopt
25 that actuary-determined employee contribution rate.

1 And then that's the rate that's set for all employer
2 contributions.

3 However, like I said earlier, Your Honor, because
4 the D-C plan is now different than from its
5 inception -- I'm sorry, the D-B plan, because of the
6 creation of the D-C plan.

7 During the November 2 hearing, we actually
8 presented to the Court different scenarios, whereby the
9 Government actually paid 100 percent, which would be
10 the actuary-determined rate, even if they did that, it
11 still would not be enough to meet the demands of the
12 annual budget of the Retirement Fund, and that's why
13 we've been encouraging the Legislature to amend Public
14 Law 6-17 and come up with a different way in which to
15 ensure that the Retirement Fund is financially --

16 THE COURT: I understand that. My question is
17 real simple: How much is the Government paying towards
18 their contribution; 100 percent or less?

19 MS. ALEPUYO: If you're going to look at the last
20 public law that set the employer contribution rate,
21 it's at 11 percent.

22 THE COURT: And is the Government paying
23 11 percent?

24 MS. ALEPUYO: The Government is actually paying
25 20 percent, Your Honor.

1 THE COURT: Okay.

2 MS. ALEPUYO: On top of the 20 percent, they're
3 also paying taxes, which the Department of Finance
4 Secretary -- assistant -- Acting Secretary testified
5 during the November 2nd hearing averages -- will
6 average to about \$140,000 a month additional on top of
7 the 20 percent.

8 THE COURT: To decrease the judgment of 280,000 --

9 MS. ALEPUYO: Million. Yes, Your Honor.

10 THE COURT: Okay.

11 (Pause in the proceedings.)

12 MS. FISHER: Your Honor, if I may just very
13 briefly add, we just found from our administrator that
14 the fund website is now operable, and the financial
15 statements are all available there. They are online.

16 THE COURT: The fund, it is their position that
17 they are an arm of the State?

18 MR. HOLLMAN: Your Honor, James Hollman on behalf
19 of the fund.

20 If you look at the Mitchell factors established by
21 the Ninth Circuit, we're clearly an arm of the State
22 due to the five-factor test, and we'll go into that if
23 the Court prefers, but underlyingly, it's -- basically,
24 it's the Commonwealth is underlying guarantor, so we're
25 an arm of the State, not unlike Commonwealth Ports

1 Authority in the Ninth Circuit case.

2 THE COURT: Well, if you're an arm of the State,
3 how can you negotiate with the State? Aren't you both
4 on the same side?

5 MR. HOLLMAN: Not necessarily, Your Honor, because
6 intra government memorialization of debt is certainly
7 no novelty; Marianas Public Land Trust has, in the
8 past, with Marianas Public Land Corporation. The
9 Commonwealth Development Authority has, in the past,
10 with the Commonwealth Utilities Corporation.

11 In effect, it's a memorialization of debt. Having
12 obtained the judgment, now the money is coming in, and
13 that's basically how we look at it.

14 With regard to some form of being on the same
15 side, it's just not that simple, Your Honor, because
16 there's so many different elements of the Commonwealth
17 Government that do apply, which go back to our original
18 Federalism argument. Like the New York cases in
19 Withers, where as long as somebody is getting paid,
20 they really don't have an injury in fact, and that's
21 where we go back to the part where, you know, it deals
22 with the executive function, legislative function and
23 judicial function, as we have sought.

24 And we're still in court doing a variety of
25 different matters too. We're trying to cut costs. I

1 think the cases cited was filed in this Court that's
2 been dismissed without prejudice; is now in the
3 Superior Court concerning a long-term cutting of costs
4 to a 3 percent bonus, which we have currently in front
5 of Judge Naraja.

6 There's so many different parts of the Government
7 that do apply here, Your Honor, and that's where we
8 come with, essentially, our jurisdiction argument.

9 THE COURT: Have you moved the Court to satisfy
10 the judgment, to execute on property of the
11 Commonwealth that owes the money? They certainly have
12 a quarter of a billion dollars in assets.

13 MS. ALEPUYO: That is one of the items that we are
14 currently discussing. So yes, we have -- we have not
15 moved the Court yet, but it is an item of discussion
16 between the parties.

17 THE COURT: Well, you know, part of the definition
18 of a Court is the ability to enforce its judgments. If
19 a Court can't enforce its judgments, it's not a Court.
20 And if you've got a full Final Order, then it's got to
21 be satisfied. And in order for it to be satisfied,
22 you've got to move the Court to order that, and that
23 needs to be done.

24 MR. HOLLMAN: Your Honor, if I may, on a brief
25 aside, I think part of the miscommunication that

1 occurred was the Court's footnote referred to
2 settlement negotiations.

3 Well, you don't negotiate a judgment. We have a
4 judgment, and we just seek to enforce it, and that's
5 the post judgment procedure, and that's why Judge
6 Govendo has his mandamus authority, which we're still
7 in. We're still undergoing that mandamus authority.

8 THE COURT: Well, I ask the question again: Have
9 you asked him to execute on the judgment, to enforce
10 his judgment? I mean, what good's a judgment if nobody
11 pays any attention to it?

12 MS. ALEPUYO: Your Honor, the Court -- when it
13 issued the 231 million and, subsequently, the 280 some
14 million judgment, say that -- and ordered several
15 payments to be made, one of which was the 16 percent
16 payroll contribution rate, which was at 11 percent, and
17 in addition, the taxes to be paid to the Retirement
18 Fund.

19 With regard to that portion of the Order, that has
20 been satisfied. I mean, it continues to be satisfied
21 with the monthly payments, and in addition, the
22 Government had actually offered, and it was increased
23 to 20 percent from the 16 percent, Your Honor.

24 THE COURT: And is it anticipated -- I read in the
25 newspaper -- that's not a legal cite, but somebody was

1 quoted as saying it would take ten to 20 years to get
2 back to where it's supposed to be. Is that your
3 understanding?

4 MR. HOLLMAN: Yes, Your Honor. If I may, the
5 chairman -- that's Chairman Igisomar -- what he was
6 talking about was my understanding is the long-term
7 five-point plan, which the administrator is going to
8 present to the Legislature concerning a variety of
9 reforms, to include the legislation we drafted, the
10 pension obligation bond, a soft freeze on benefits and
11 a 457 plan, and some other things that we're working
12 on, and I think -- well, I understand we all read the
13 newspaper every day, Your Honor, but I really would
14 urge all courts in all jurisdictions, particularly this
15 jurisdiction, to be somewhat reticent as to what we
16 read in the paper on a daily basis.

17 THE COURT: All right. Thank you.

18 Mr. Jorgensen, do you have any evidence about
19 malfeasance versus misfeasance?

20 MR. JORGENSEN: I'm sorry, Your Honor?

21 THE COURT: Do you have any hard evidence of
22 malfeasance versus misfeasance?

23 MR. JORGENSEN: No, Your Honor. Your Honor, some
24 of what you were saying did strike a chord with regard
25 to the judgment itself, which took three years to get,

1 and the Government having not moved yet to satisfy the
2 judgment. One of the adages I've always heard you
3 mention in court is "justice delayed is justice
4 denied".

5 What we're looking at here now is about four years
6 have already gone by, and nothing's transpired, and now
7 we're hearing about a five-point plan involving the
8 CNMI Legislature, which historically, has been
9 problematic; that is, any legislative involvement with
10 the CNMI Legislature has been problematic, and we don't
11 seem to see any security here. That is, what's the
12 back-up if and when the legislation transpires, what's
13 to secure the debt if the legislation is amended or
14 modified, as was done with Immigration over the course
15 of 20 years? It seems to me that -- I don't even
16 really understand why there's negotiations, when they
17 can go in and enforce this judgment, and --

18 THE COURT: Well, that's an end in sight.

19 MR. JORGENSEN: Yeah. I mean, then you're working
20 from a position of strength, or at the very least,
21 you're an option on the properties, CUC, CPA, CHC.
22 There wouldn't be any need for negotiations. I don't
23 understand why this is taking so long.

24 THE COURT: Is Mr. Lord still involved in this
25 case?

1 MR. JORGENSEN: Yes, he is.

2 THE COURT: Why doesn't he intervene at the
3 Superior Court and attempt to enforce the judgment?

4 MR. JORGENSEN: He's in the process of going
5 in-house with a private entity, Your Honor, which does
6 not involve the practice of law. He made that decision
7 last Friday, I believe.

8 THE COURT: That's why I just asked, is he still
9 involved with this case, and apparently, he is legally,
10 but he's going to be dropping out. Is that what you're
11 telling me?

12 MR. JORGENSEN: Yes. He won't be playing an
13 active role, Your Honor.

14 THE COURT: You mean he won't be counsel of record
15 anymore?

16 MR. JORGENSEN: I anticipate that. He has not
17 told me that himself, but that's what I anticipate.

18 THE COURT: Well, then it occurs to me that either
19 you or somebody else should move to intervene to
20 enforce the judgment, rather than opening up another
21 lawsuit.

22 Okay. Does anybody want to say anything else?
23 I've read everything that you've filed with the Court.
24 We don't need to go through that again.

25 MR. JORGENSEN: I have nothing further, Your

1 Honor, although I'd like to wish you, everyone, best
2 wishes for a happy 2010.

3 THE COURT: Thank you.

4 Anybody else want to say anything?

5 I'd like to wish everybody the same best wishes.

6 MS. FISHER: Your Honor, same for us. Best
7 wishes, and we trust that the Court has all the papers.
8 Thank you.

9 THE COURT: The Court, obviously, is not ready to
10 rule from the bench on this. The Court will take this
11 matter under advisement and apprise counsel of the
12 Court's ruling.

13 I got to tell you, if anybody hasn't gleaned from
14 the Court's questions and the answers, I think an
15 abstention at this time is probably going to be the
16 Order. I mean, we've got a Court of record of
17 competent jurisdiction that has issued a judgment in
18 this matter, and if anybody thinks that that judgment
19 hasn't been paid or is not being paid, they need to
20 urge the Court, and in order to have standing to make
21 the argument to the Court, they're going to have to
22 move to intervene. It seems pretty simple.

23 There being nothing further to come before the
24 Court, I'll wish everybody a Happy New Year too, and
25 we'll take up the next matter.

1 MR. JORGENSEN: Thank you, Your Honor.

2 MS. FISHER: Thank you, Your Honor.

3 MR. HOLLMAN: Thank you.

4 (The proceedings were concluded.)

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CERTIFICATE OF REPORTER

I, PATRICIA A. GARSHAK, Official Court Reporter, in the United States District Court for the Northern Mariana Islands, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of the proceedings held in the within entitled and numbered cause on the date hereinbefore set forth, and I further certify that the foregoing transcript has been prepared from an audio tape to the best of my ability.

PATRICIA A. GARSHAK, RDR-CRR
Official Court Reporter